United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7068

United States Court of Appeals

For the Second Circuit

INTERNATIONAL HALLIWELL MINES, LIMITED and LA SOCIETE D'EXPLOITATION ET DE DEVELOPPEMENT ECONOMIQUE ET NATURAL D'HAITI,

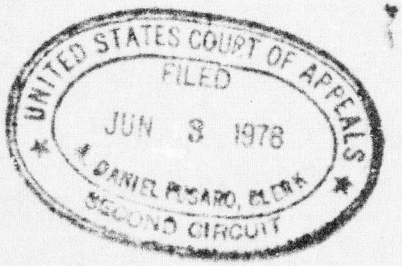
Plaintiffs-Appellants,

against

CONTINENTAL COPPER & STEEL INDUSTRIES, INC., MORTIMOR S. GORDON, MIDLANTIC NATIONAL BANK, as Executor of the Estate of WALTER H. KNORR, SAMUEL M. GOLDMAN and DELIA JACOBS, as Executors of Estate of SAMUEL UNGERLEIDER, MARION V. WHEELER, as Executrix of the Estate of ARTHUR WHEELER and ELEONORA HARRIS, ROBERT HARRIS and JOSEPH STEINHARDT, as Executors of the Estate of HARRY HARRIS,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES



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United States Court of Appeals

For the Second Circuit

Docket No. 76-7068

—o—

INTERNATIONAL HALLIWELL MINES, LTD., *et ano.*,

Plaintiffs-Appellants,

against

CONTINENTAL COPPER & STEEL INDUSTRIES, INC., *et al.*,

Defendants-Appellees.

—o—

BRIEF OF DEFENDANTS-APPELLEES

Plaintiffs appeal from a judgment rendered after trial by the United States District Court for the Southern District of New York, Hon. Dudley B. Bonsal, Judge, which sustained defendants' affirmative defense of settlement. The unreported memorandum order of the District Court appears at pages 35a-56a of the joint appendix in this Court.

Counterstatement of the Issues

1. Did the Court below properly dismiss plaintiffs' complaint against defendant Continental where the evidence showed that plaintiffs and defendant had entered into a Settlement Agreement compromising all claims between them, which agreement was unanimously approved by plaintiffs' admittedly independent boards of directors and by their stockholders, and when the claim of "economic duress," on the basis of which plaintiffs seek to avoid the

terms of that Settlement Agreement, was first asserted over two years after that Agreement was approved and ratified, after the Agreement had been fully performed by defendant, and after plaintiffs had received and accepted the benefits of defendant's full performance, and where plaintiffs continued to perform their obligations under the Agreement for more than one year after this action was commenced?

2. Where plaintiffs' allegations and the trial evidence made it clear that the individual defendants were sued solely as agents of defendant Continental, did the Court below properly dismiss the complaint against them on the ground that, under fundamental principles of agency and the law respecting joint tortfeasors, the Settlement Agreement between plaintiffs and Continental acted as a settlement with the individuals?

Counterstatement of the Case

The evidence at trial showed that as of March 15, 1968, plaintiff International Halliwell Mines, Ltd., then Consolidated Halliwell, Ltd. ("Halliwell") and defendant Continental Copper & Steel Industries, Inc. ("Continental") entered into a Settlement Agreement (dx A; 243A-249A[1]) which the District Court found settled all grievances outstanding among the parties.

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[1] The following abbreviations are used in the citations in this brief: "A" with appropriate page numbers to the Exhibit Volume; "a" with appropriate page numbers to the Joint Appendix; "tr" with appropriate page numbers to the trial transcript; "dx" to defendants' exhibits; "px" to plaintiffs' exhibits; " dep." with appropriate witness and page numbers to deposition testimony. All exhibit references are to exhibits in evidence.

In April 1968 the Settlement Agreement was approved by unanimous vote of the boards of directors of Halliwell and of its wholly-owned subsidiary La Societe d'Exploitation et de Developpment Economique et Naturel d'Haiti ("Sedren")[2] (dx K, L; 294A-302A). Plaintiffs admit that approval came nine months after Continental "ceased to control the Board of Directors and the management and operations of the plaintiffs" (amended complaint, ¶ THIRTY-THIRD, 15a).[3] At that time only one of the seven members of the Halliwell board had any connection with Continental. Although he voted to approve the Settlement Agreement, his vote was not required either to make up a quorum for the meeting (dx Q, 381A, 388A; dx L; 296A-297A) or to carry the question (*ibid.*).

Halliwell then procured ratification of the Settlement Agreement by its shareholders at a meeting held May 13, 1968; at the meeting the Agreement was unanimously approved by vote of all shareholders attending in person or by proxy, with Halliwell management (not affiliated with Continental) casting its proxies in favor of the Agreement (dx N; 318A-368A).

Continental fully performed its obligations under the Settlement Agreement by June 19, 1968 (tr. 167). This action was commenced on April 10, 1970. Halliwell continued to perform under the Settlement Agreement through July 1, 1971, more than one year after the institution of this action and after defendants had answered the original

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[2] Sedren "consented to and adopted" the Settlement Agreement (dx A; 249A).

[3] Defendants deny having had or having exercised any improper degree of "control" over plaintiffs at any time. However, in view of plaintiffs' admission that any control had ceased long before the Settlement Agreement was executed, approved, ratified, and performed, the matter of control in earlier years was not relevant to the issue tried below, which was dispositive of the case.

complaint, pleading the Settlement Agreement as an affirmative defense (dx C [4]; 261A).

The most significant omission from plaintiffs' Statement of the Case in this Court is the fact—which plaintiffs admit in their complaint—that any control by Continental over plaintiffs ceased in July 1967. At that time Halliwell elected a new board of seven directors, only one of whom was affiliated with Continental (dx C; 253A-255A; dx Q; 381A-382A). The District Court found that the Settlement Agreement was negotiated by parties operating "at arm's length" (44a).

The misleading effect of the omission of this plain and undisputed fact from plaintiffs' description of the case is compounded by their constant references to the 1967 contracts and releases in the same breath as the Settlement Agreement (*e.g.*, pl. br. 8, 9, 44, 45, 48, 55). The Settlement Agreement was negotiated, drafted, signed, approved, and presented to Halliwell's board and shareholders at a time when Halliwell indisputably was not controlled by Continental, a fact which at once renders much of plaintiffs' description of the case irrelevant and their legal arguments academic.

Validity of board approval by plaintiffs of the Settlement Agreement is not challenged on this appeal. Also not challenged on this appeal are the District Court's finding that the comprehensiveness of the Settlement Agreement encompassed the claims asserted in plaintiffs' amended complaint (42a-43a), or the fact that plaintiffs were aware at the time the Settlement Agreement was executed of the subject matter and scope of the claims settled and now asserted (e.g., tr. 142, 146, 149).

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[4] Defendants' Exhibit C consists of facts stipulated by the parties prior to trial and received in evidence by the District Court.

What follows in this Counterstatement of the Case is a recital of the facts necessary to show the relationship among the parties and the scope of the Settlement Agreement.

The parties

Plaintiff Halliwell is a Quebec corporation which had its principal place of business in Toronto, Province of Ontario, Canada. Plaintiff Sedren was a wholly-owned subsidiary of Halliwell and a Haitian corporation, with its principal place of business in Port-au-Prince, Haiti. From at least 1959 through 1971, Sedren owned and operated a copper mine in Haiti. Defendant Continental is a Delaware corporation which has its principal place of business in New York City. Defendants Mortimor S. Gordon, Harry Harris, Samuel Ungerleider, and Arthur Wheeler [5] were sometime directors of Continental; defendant Walter Knorr was vice president and treasurer of Continental, and Gordon was president and chief executive officer of Continental. Gordon and Harris served as directors of Halliwell from 1960 to July 1967; Ungerleider and Wheeler from 1961 to July 1967; and Knorr from 1961 to May 1968 (dx C; 252A-255A).

Background dealings among the parties

Halliwell, Sedren, and Continental entered into a contract dated April 1, 1959 ("the 1959 contract") (dx D; 262A) whereby Sedren agreed to sell to Continental the first eighty million pounds of copper wirebar obtainable from ore mined at Sedren's mine in Haiti. Halliwell guaranteed Sedren's obligations under the contract. As grudgingly admitted by plaintiffs in this Court (pl. br. 48), but as candidly acknowledged by Halliwell's vice president,

[5] Harris died prior to commencement of this action, and Knorr, Ungerleider, and Wheeler died after the action was commenced. The executors of the estate of each are parties defendant in this action (dx C; 252A-255A).

Graetz (Graetz dep. 699-700) and as found by the District Court (38a), the 1959 contract was entered into after negotiations at arm's length, at a time when *no person associated with Continental* sat on the board of directors of Halliwell or Sedren. Under the 1959 contract, if eighty million pounds of copper wirebar had not been delivered by June 30, 1964, the initial contract term, Continental had the option of extending the contract term to permit performance by Sedren or of terminating the contract and claiming liquidated damages under a formula in the contract (39a; dx D, ¶ 7, 265A-266A).

The 1959 contract called for delivery of copper to Continental in wirebar form (a 265 pound slab of copper metal). Sedren had no smelting facilities to convert the copper concentrate (a white powder containing copper and impurities) produced at its mine to wirebar, and had contracted with Phillipp Brothers (a firm of metals brokers) for delivery of copper wirebar to Continental. Sedren's contract with Phillipp Brothers expired on June 30, 1964, the same date as the initial contract term of the 1959 contract with Continental (41a-42a).

Halliwell and Sedren were continuously underfinanced (40a). In connection with a refinancing of Halliwell and Sedren in 1961, Continental exchanged sixty thousand shares of its preferred stock for a mortgage on Sedren's Haitian mine to Continental of $1.5 million; Sedren, as contemplated by the parties, then used the Continental preferred stock as collateral for a bank loan of $1.1 million. Shortly after this refinancing, Continental, having acquired a substantial financial interest in Halliwell and Sedren, was permitted to nominate five directors to Halliwell's eleven man board (dx C, 256A-257A).

By June 30, 1964, the initial contract term under the 1959 contract, Sedren had caused to be delivered to Continental only 38,556,000 pounds of copper (40a). Had Continental elected to terminate the 1959 contract at that time, it would have been entitled to liquidated damages of approximately $800,000 against Sedren under the liquidated damages clause of the 1959 contract (dx D, ¶ 7, 265A-266A; dx C, ¶ 18, 257a).

However, the parties agreed to extend the time for delivery, and Halliwell, Sedren, and Continental entered into two agreements dated as of July 1, 1964, which modified the 1959 contract. The first agreement ("the 1964 wirebar agreement") (dx E, 269A) extended for 2½ years, until December 30, 1966, the time in which Sedren could complete delivery of the eighty million pounds of copper but provided that, if it chose to do so, Sedren could satisfy its obligation to deliver wirebar by delivering the equivalent amount of copper in copper concentrates instead. The second agreement ("the 1964 concentrates agreement") (dx F; 274A) provided that Sedren would sell its copper concentrate production to Continental for the 2½ year period from July 1, 1964 through December 31, 1966. The 1964 agreements provided for expiration on December 31, 1966, at which time the original 1959 contract would again be in effect (41a).

Negotiations preceding the Settlement Agreement

As the expiration date of the 1964 contracts approached, Halliwell became involved in lengthy, and at times acrimonious, negotiations involving the 1959 contract as amended. The 1964 agreements, which modified the 1959 contract, by their terms were to expire on December 31, 1966. In late 1966 Halliwell was in arrears on payments of discounts

under the 1959 contract (as modified in 1964) to Continental (dx V, 498A-500A).

Also due in December 1966 was an interest payment to Halliwell's debentureholders, and Halliwell's principal debentureholder [6], Consolidated Mogul Mines Ltd. ("Mogul"), began to press for assured debenture payments, a matter which of course was affected by Halliwell's other contractual arrangements. At the time, Mogul had two nominees on the Halliwell board of directors, R. D. Bell and D. W. Knight (tr. 96).

The status of the 1959 contract as amended was discussed by the Halliwell board of directors on December 14, 1966, with Continental at loggerheads with Halliwell and Mogul. At that meeting Gordon stated that upon expiration of the 1964 agreements on December 31, 1966, at which time the 1959 contract would again be in effect, Continental would require performance under the 1959 contract by delivery of wirebar. Gordon stated that Continental would not continue its financial assistance to Halliwell [7] for the benefit of Halliwell's debentureholders. A proposal from Mogul to Halliwell under which Continental would waive delivery of wirebar and agree to purchase concentrates, and which would provide for payment of principal and interest on the outstanding debentures, was presented for consideration by the board (dx V; 495A-503A).

At and prior to this meeting, three directors of Halliwell —Bell, a representative of Mogul, and Cooper and Graetz, Halliwell officers—stated that the 1959 contract was no

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[6] In December 1966 Mogul held debentures in the principal amount of $2,757,000 of a total of $2,907,000 debentures outstanding (tr. 66-67).

[7] As the District Court noted, throughout the period of its contractual relationship with Halliwell and Sedren, Continental provided financial and other concessions to plaintiffs (51a).

longer enforceable by reason of frustration (Graetz dep. 586-587; Cooper dep. 112-114; tr. 105-106). Gordon stated that it was valid and enforceable. Bell stated at the meeting that Halliwell's counsel should prepare an opinion outlining the company's position under the 1959 contract as amended, and that a copy of the opinion should be forwarded to each director as soon as possible (dx V, 500A; tr. 105-106).

Two days later the Toronto law firm of Faskin, Calvin, MacKenzie, Williston & Swackhamer delivered its written opinion to Cooper, Halliwell's president (dx W, 504A; Cooper dep. 112-113), concluding that the 1959 contract was enforceable. The opinion was signed for the firm by Fraser Fell, a partner, who was also a director of Halliwell. In a subsequent letter to Cooper, dated January 9, 1967 (px 32; 240A), Fell again concluded that the contract was enforceable (Cooper dep. 113-114).[8]

Continental and Halliwell exchanged correspondence on the subject of a new copper contract in January and February of 1967 (dx Z, AA; 511A-515A). During these discussions, because of claimed frustration of the 1959 contract, Continental also requested that all prior contracts be reaffirmed (*ibid*). Also, during and prior to this time, Halliwell had accused Continental and Gordon of mismanaging Sedren's mine in Haiti in various respects (e.g., Cooper dep. 57-58, 77, 175-180, 197). Mogul also made a number of accusations against Continental during this period, especially in connection with its claim that the 1959

[8] Plaintiffs' reference to an opinion from Continental's counsel (pl. br. 19), a document never sought in discovery and never identified in discovery or at trial, is irrelevant in view of the two opinions prepared by Fell, a Halliwell director whose law firm had no connection with Continental.

contract was no longer enforceable (dx Z, 512A; dx AA, 514A-515A). Because of these accusations, Continental requested releases from Halliwell and Sedren (*ibid*).

Negotiations for new copper contracts continued through April, culminating in a meeting of the Halliwell board of directors on April 12, 1967. At that meeting a new wirebar agreement (dx H, 287A) and a new concentrates agreement (dx G, 284A) among Halliwell, Sedren, and Continental were approved by the Halliwell board. Prior to the vote on approval, the two Mogul nominees on the Halliwell board (Bell and Knight) and Fell resigned as directors (44a; px 1, 162A-1); the contracts, and releases to Continental, were authorized by the remaining directors with one abstention and no negative votes. Releases (dx I, J; 292A-293A) were separately executed by Halliwell and Sedren soon after (42a).

Execution of the 1967 agreements did not, however, end the dispute among Continental, Halliwell, and Mogul, nor Mogul's contention that the 1959 contract as amended had become unenforceable. On the day following the April 12 board meeting, Bell telephoned a revised proposal from Mogul to Murray Cooper, Halliwell's president (dx AB, 516A; Cooper dep. 125-126). On April 19 Mogul through its counsel sent a written proposal to Continental (tr. 123-124; dx AC, 517A-521A) which included, among other things, provisions that the 1959 contract be terminated (dx AC, ¶ 5; 521A). Continental countered by sending to Halliwell and Mogul's counsel a memorandum dated June 14, 1967, entitled "Suggestions for Basis of Agreement by Consolidated Halliwell Ltd." (dx AD; 522A), which provided, among other things, for extension of maturity of the Halliwell debentures, infusion of new money to Sedren, deferred payments on the Continental mortgage on the Sedren mine,

and payment to Continental of monies owing from Sedren in preference to retirement of the debentures (*id.* ¶¶ 3-5; 523A-524A).

This proposal was unacceptable to Mogul. Mogul's counsel so advised Halliwell by letter of June 23, 1967 (dx AE, 526A-527A), claiming that the Continental proposal would have the effect of operating Sedren "for the benefit of Continental" (*id.*, 526A). In a letter of June 20, 1967, communicated to Halliwell on June 23, Mogul advised that either Mogul, Bell, or Knight, as shareholders of Halliwell, intended to take action to have the 1959 contract as amended set aside and to have Continental account to Halliwell or Sedren for any profits (*id.*, 527A). Also on June 20, Bell wrote to the Toronto Stock Exchange, purportedly to explain his reason for resigning from the Halliwell board. He stated that the Continental directors of Halliwell would not permit a challenge to the validity of the 1959 agreement, and that Mogul (and United States counsel allegedly retained by Halliwell) believed that the 1959 contract was unenforceable because of frustration. It was also alleged that the 1967 agreements were void because the Continental directors had voted in favor of them as directors of Halliwell (*id.* 530A-532A). Copies of the Mogul-Continental correspondence and the Bell letter to the Toronto Stock Exchange were provided to Halliwell (Graetz dep. 652-654; dx AE, 525A-532A).

At a meeting of the Halliwell board of directors on July 18, 1967, the directors were advised that Continental and Mogul were pressing for settlement of their respective accounts. At that meeting, the board resolved that Cooper and J. M. Wainberg, a Toronto barrister who succeeded Fell as counsel to Halliwell, be authorized to negotiate on behalf of Halliwell with Continental and Mogul (dx AF, 535A).

By means of a by-law change approved by the shareholders on July 25, 1967, as of that date the Halliwell board was reduced from eleven members to seven, with three directors to constitute a quorum (dx AG, Q; 539A, 381A). Of the seven directors elected on July 25, 1967, only Walter Knorr was affiliated with Continental (*ibid.;* dx C, ¶ 4-9, 253A-255A). After July 25, 1967 Continental had no control over the management or operations of Halliwell and Sedren, if it ever did (44a; amended complaint, ¶¶ FOURTEENTH, THIRTY-THIRD, 10a, 15a; Graetz dep. 669).

Negotiations among Continental, Mogul, and Halliwell continued, with the barrister Wainberg (who had been elected to the Halliwell board in July 1967) taking the lead. By letters dated September 1, 1967 to Herman Keller, Continental's counsel (dx AH, 554A) and September 7, 1967 to Gordon (dx AI, 555A-559A), Wainberg sought to resolve outstanding matters among Halliwell, Sedren, Mogul and Continental (*ibid.;* Cooper dep. 137-139). Wainberg's intentions were clear: in the letter to Gordon he stated that "I pointed out to you that I had no authority to discuss the validity of your sales contract, your mortgage or any other matter in issue between the parties . I am interested only in negotiating for a settlement of all issues" (556A). The September 1967 proposal included, among other things, provisions for cancellation of the debentures and issuance of equity securities therefor (¶ 3), cancellation of the 1959 contract as amended (¶ 6), and complete mutual releases by all parties involved (¶ 9) (555A-559A).

By letter of December 1, 1967 to Gordon (dx AJ, 560A-565A), Wainberg submitted a revised draft copy of a proposed settlement agreement among Halliwell, Mogul, and Continental. This draft, among other things, included provisions for cancellation of the debentures in exchange for equity securities (¶ 2), extension of mortgage payments to

Continental (¶ 3), and guarantees by Continental of bank loans to Halliwell for $300,000 (¶ 5).

A memorandum of settlement sent by Graetz to Knorr on February 23, 1968 (dx AN, 566A-568A) provided for, among other things, guarantees by Continental and several shareholders of a new bank loan to Sedren of $300,000, in exchange for 350,000 shares of Halliwell common stock (¶ 1); deferred payments on Continental's mortgage upon the Sedren mine and of unpaid discounts of $109,000 (¶ 2, 3); payment of liquidated damages to Continental by Halliwell stock instead of in cash (¶ 4); cancellation of some debentures and substitution of stock for the remaining debentures (¶ 5); and cancellation of all Continental-Sedren contracts (¶ 7).

The Settlement Agreement

These extensive negotiations resulted in two agreements dated as of March 15, 1968: the Settlement Agreement among Continental, Halliwell, and Maurice Goodman and Associates (substantial shareholders of Halliwell) (dx A, 243A)[9], and an agreement among Halliwell and its debentureholders ("the debentureholder agreement") (dx M, Schedule A, 30[illegible]A).

The Settlement Agreement provided for: (i) the payment by Sedren and Halliwell to Continental in specified installments of the sum of $326,343.96 for the unpaid principal and accrued interest upon Continental's mortgage upon the Sedren mine[10]; (ii) the disposition of Continental's claim for liquidated damages in the sum of $323,868 by the issuance of 359,100 shares of Halliwell common stock

[9] The Settlement Agreement was modified in respec[illegible] not material to this litigation by supplemental agreement dated May 8, 1968 among Continental, Halliwell, and Maurice Goodman and Associates (42a; dx B, 250A).

[10] This mortgage had been in default since June 29, 1967 (dx AG, 552A).

(¶ 4); (iii) the payment of the sum of $109,836 as the discount claimed by Continental as of March 31, 1968, payable in specified installments (¶ 5); (iv) the termination of the 1959 wirebar contract as amended in 1964 and 1967 and the 1964 concentrates agreement as amended in 1967 (¶ 3); (v) the ratification, confirmation and approval of the 1959 contract, the 1964 agreements, the 1967 agreements, and the 1967 releases (p. 2); and (vi) the guarantee by Continental, for 150,000 shares of Halliwell stock, of bank loans to Halliwell or Sedren of $300,000 (¶ 1).

The debentureholder agreement, also dated as of March 15, 1968, among Halliwell, Mogul, and National Outlook Corporation (a minor debentureholder of Halliwell) (tr. 67; dx M, 308A-310A), provided for conversion of the debentures ($2,907,000 principal amount) and unpaid interest aggregating $670,920.43 into 1,574,285 shares of Halliwell common stock (dx M, 308A-310A). Many of the provisions of the final two agreements originated with Wainberg's proposals in September and December 1967.

The Settlement Agreement and the debentureholder agreement were approved on April 8, 1968 by the unanimous vote of the five directors of Halliwell present: A. H. Graetz, M. Cooper, W. H. Knorr, M. Rukeyser, J. M. Wainberg (dx C, 259A; dx L, 296A-297A). At this time, Halliwell's by-laws provided for a quorum of three directors (dx Q, 388A, 381A). Of Halliwell's seven directors at this time, only Knorr was also affiliated with Continental. The Settlement Agreement was approved by the board of directors of Sedren on April 1, 1968 with no votes in opposition (dx K, 294A).

By the terms of the Settlement Agreement (¶¶ 6, 8), Halliwell was required to obtain the approval of its shareholders of the Agreement and of the debentureholder agree-

ment.[11] Halliwell submitted the two agreements to its shareholders for approval at a general and special meeting on May 13, 1968. Prior to the meeting, Halliwell forwarded to its shareholders an annual report and an Information Circular and Proxy Statement which contained summaries of the two agreements and full text of the agreements. This material also revealed Knorr's position as a director of Halliwell and an officer of Continental (dx C, ¶ 36, 259A; dx L, M, N, 296A-368A).

On May 13, 1968, there were 11,936,674 shares of Halliwell common stock outstanding. Of that number, 35,500 were present in person and 3,602,860 were represented by proxy at the annual meeting, a quorum of the company's shareholders (dx N, 318A-319A). The Settlement Agreement was approved without objection by the vote of all the shareholders present in person or by proxy at the meeting (dx C, ¶ 37, 259A; dx N, 321A, 329A). Halliwell's by-laws provided that an agreement approved by the majority of the shares cast at a meeting called to consider the agreement was as binding upon the corporation as if the agreement had been approved by all of the shareholders (dx P, 376A).

The debentureholder agreement was also approved without objection at the May 13, 1968 shareholders meeting (dx N, 321A, 329A).

Performance under the Settlement Agreement

Three days after the shareholders meeting, Halliwell (through Cooper, its president) advised Continental in writing that the shareholders had approved the Settlement

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[11] The Settlement Agreement and the debentureholder agreement were each subject to shareholder approval of both agreements. After shareholder approval, the debentureholder agreement was fully performed by all parties (tr. 127-128).

Agreement and called upon Continental to perform its obligations under the Agreement (dx O, 369A). When Halliwell obtained a bank loan of $300,000 as a result of Continental's guarantee on June 19, 1968, Continental had fully performed its obligations under the Settlement Agreement (tr. 167).

Halliwell and Sedron continued to make payments as provided in the Settlement Agreement (dx A, ¶ 2, 5, 245A-247A) through July 1, 1971. Within a year of the execution of the Settlement Agreement Halliwell obtained additional financing of $1,500,000 through a private placement of common stock (px 27, 221A).

Commencement of this action

The original summons and complaint in this diversity action were served on Continental on April 10, 1970 and shortly thereafter upon the individual defendants. The defendants served answers to the original complaint on April 30 and May 22, 1970, each asserting as an affirmative defense that plaintiff's action was barred by the Settlement Agreement [12] (dx C, 261A). Each defendant reasserted this affirmative defense in his answer to the amended complaint.

Prior proceedings in this case

After extensive discovery proceedings, the parties'

[12] Halliwell and Sedren were also notified of Continental's interpretation of the effect of the Settlement Agreement when Sedren sought arbitration of a pricing dispute (identical to the FOURTH CLAIM in the amended complaint in this action) under the 1967 contracts on January 30, 1969 (dx S; 411A). Continental moved in Supreme Court, New York County, to stay the arbitration on the ground that the Settlement Agreement barred the claim (dx T; 416A). The motion to stay was granted and an order was entered on November 10, 1969 permanently staying the arbitration (dx U; 492A).

crossmotions for summary judgment [13] were denied by the District Court (Hon. Richard Owen, Judge), by order filed March 18, 1975 (3a). Under the District Court's "crash program" the case was set for trial in the summer of 1975 before Judge Bonsal. At a hearing on August 20, Judge Bonsal determined that a separate trial on the issue of settlement was appropriate, since there would be no need to try the remainder of the issues should the affirmative defenses be sustained (38a).[14] The case was tried to the District Court in sessions held September 18, 23 and 25, 1975 (38a). Judge Bonsal's memorandum opinion was filed January 13, 1976 (55a) and judgment for defendants entered January 27, 1976 (57a).[15]

ARGUMENT

I.

Plaintiffs Have Failed To Carry Their Burden Of Establishing That The Settlement Agreement Was Entered Into Under Duress.

The foregoing recital of the facts and circumstances of the disputes preceding the Settlement Agreement, the negotiations culminating in the Settlement Agreement, and performance under the Settlement Agreement utterly

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[13] Defendants moved for summary judgment based on the Settlement Agreement and plaintiffs' cross-moved on the issue of defendants' liability. Judge Owen denied both motions, finding that "duress" in the execution of the Settlement Agreement and whether defendants controlled plaintiffs prior to July 1967 (an essential element of a finding of liability) were issues of fact for trial.

[14] Plaintiffs do not challenge on this appeal the propriety of the separate trial on the issue of settlement.

[15] The District Court also directed dismissal of Continental's counterclaim for services rendered to Sedren prior to the Settlement Agreement (55a). Continental crossappealed from that portion of the judgment (5a) only to preserve the issue.

demolishes plaintiffs' principal contention in this Court, that the Settlement Agreement was exacted from the plaintiffs under "the grossest form of economic duress" (pl. br. 5). That contention is based on hypotheses squarely contradicted by the trial record, especially by the admitted fact that Continental had ceased to exert any control over plaintiffs months before the Agreement was signed.

Plaintiffs' characterization of the Settlement Agreement as "dictated" or "demanded" by Gordon (pl. br. 41, 55, 57) has no support in the record; as shown above, negotiations among Halliwell, Continental, and Mogul began as early as December 1966, and proceeded at arm's length for months after the Continental nominees left the Halliwell board, with Wainberg, Halliwell's counsel, as the moving force. Under the facts established at trial, plaintiffs' claim of duress falls far short of the standards set by this Court.

(1) The District Court properly found that plaintiffs failed to establish duress.

The burden of proof to establish duress sufficient to avoid a contract is on the party making the claim, here the plaintiffs, *Mason* v. *United States*, 17 Wall. [84 U.S.] 67, 74 (1872). As this Court has recently held (*First National Bank of Cincinnati* v. *Pepper*, 454 F.2d 626, 634 (1972)), that burden is a heavy one. The evidence at trial fully supports Judge Bonsal's conclusion that plaintiffs failed to carry it.

The Settlement Agreement was signed only after long negotiations and, despite plaintiffs' conclusionary assertions to the contrary, was not presented as a take it or leave it proposition at the last moment. Negotiations, especially lengthy negotiations, are not consistent with a claim of duress, *Allstate Medical Laboratories, Inc.* v. *Bleivas*, 26 A.D. 2d 536, 271 N.Y.S. 2d 371 (1st Dept. 1966), *affirmed*

without opinion 20 N.Y. 2d 654, 282 N.Y.S. 2d 268, 229 N.E. 2d 50 (1967) (three day negotiations). Throughout the negotiations plaintiff was represented by qualified counsel, another fact inconsistent with the claim of duress. *Nixon* v. *Leitman*, 32 Misc. 2d 461, 224 N.Y.S. 2d 448 (N.Y. Sup. 1962); *Allstate Medical Laboratories, Inc.* v. *Bleivas, supra.* Legally cognizable duress must be exerted at the time the contract is executed, *First National Bank of Cincinnati* v. *Pepper, supra; Hellenic Lines Ltd.* v. *Louis Dreyfus Corp.*, 372 F.2d 753 (2d Cir. 1967); in this case, defendants concededly exerted no control over plaintiffs for more than eight months prior to the date of the Settlement Agreement.

Plaintiffs also failed to demonstrate any action by Continental which rises to the level of legally cognizable duress. The threat of a lawsuit, be it "the juiciest lawsuit in the states" (tr. 94) or "enforcing Continental's alleged rights to the hilt" (Graetz affidavit[16], quoted at pl. br. 40-41), is not duress as a matter of law, as Judge Bonsal found. There is no evidence that the claims asserted by Continental were asserted in bad faith, and bad faith "tantamount to an abuse of process" must be found to make out a claim of duress, *Oleet* v. *Pennsylvania Exchange Bank*, 285 A.D. 411, 414-415; 137 N.Y.S. 2d 779, 783 (1st Dept. 1955); *Scientific Holding Co., Ltd.* v. *Plessey Inc.*, 510 F.2d 15, 22 (2d Cir. 1974). The opinions of Halliwell's counsel in 1966 and 1967 (p. 9, *supra*) that the 1959 contract was enforceable conclusively set to rest plaintiffs' intimation that Continental's insistence on performance was in bad faith; and plaintiffs have never challenged the validity of Sedren's mortgage obligation. And it is axiomatic that financial exigency alone is insufficient as a matter of law to establish duress, *Joseph F. Egan, Inc.* v. *City of New York*, 17 N.Y. 2d 90, 268 N.Y.S.

[16] Plaintiffs did not offer this affidavit at trial. See pp. 28-29, *infra*.

2d 301, 215 N.E. 2d 490 (1966), *Scientific Holding Co., Ltd.*, v. *Plessey Inc., supra*, 510 F.2d at 22.[17]

Two essential elements of duress are conspicuously absent from the trial record; plaintiffs offered no proof of them. There was no attempt to show that financial assistance was unavailable from a source other than Continental. Compare *Austin Instrument, Inc.* v. *Loral Corp.*, 29 N.Y. 2d 124, 130-131, 324 N.Y.S. 2d 22, 25-26, 272 N.E. 2d 555 (1971). Any belated effort by their counsel so to assert, or to claim that Graetz would have so testified, is rebutted by Halliwell's stock offering in 1969, under which it received $1,500,000 in new equity capital.

Secondly, plaintiffs have never attempted to explain why the Settlement Agreement was the only available escape from their financial problems in March 1968. If, as plaintiffs then asserted, the 1959 contract was no longer enforceable; and if, as plaintiffs then asserted, Continental had mismanaged Sedren's business; and if, as plaintiffs then asserted, the 1964 and 1967 agreements were without

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[17] Plaintiffs have pointed out that the debentureholder agreement executed simultaneously with the Settlement Agreement was contingent upon approval of the Settlement Agreement; if the Settlement Agreement were not accepted, the argument runs, Halliwell could not have reached settlement with its debentureholders and would have been immediately liable for over $3,000,000 of debt and interest. Even if this were to rise to the level of legally cognizable duress (which it does not), it can hardly be attributed to Continental, which was not a party to the debentureholder agreement and whose interests had been contrary to those of the debentureholders since at least December 1966 (pp. 7-13 *supra*). Duress exerted by the debentureholders might conceivably serve as grounds to invalidate the debentureholder agreement, although Halliwell has never made such a claim (tr. 128); it cannot serve as grounds to avoid Halliwell's separate obligations to Continental in the Settlement Agreement. Moreover, the conversion of substantial debt into equity is obviously an attractive proposition to a company in circumstances as straitened as those described in plaintiffs' brief.

force and effect, plaintiffs had an obvious alternative—to refuse to pay Continental and to seek appropriate redress through litigation, perhaps alleging the same claims resurrected in this lawsuit.[18] The existence of an adequate remedy at law is incompatible with a claim of duress, and the availability of litigation has been held sufficient to defeat a claim of duress, *Undersea Engineering & Construction Co., Inc.* v. *International Telephone & Telegraph Corp.*, 429 F.2d 543, 550 (9th Cir. 1970); *Kohn* v. *Kenton Associates, Ltd.*, 280 N.Y.S. 2d 520 (1st Dept. 1967); *Colonie Construction Corp.* v. *DeLollo*, 25 A.D. 2d 464, 266 N.Y.S. 2d 283 (3d Dept. 1966), *affirmed without opinion*, 20 N.Y. 2d 917, 286 N.Y.S. 2d 271, 233 N.E. 2d 287 (1967); 17 N.Y. Jur., Duress and Undue Influence § 5.

Plaintiffs cite only two cases in support of their contention, belied by the record, that they were forced to accept the Settlement Agreement under duress. The first, *Perlstein* v. *Scudder & German*, 429 F.2d 1136 (2d Cir. 1970) (pl. br. 56), has been universally read as standing only for the proposition that settlement agreements are not above judicial scrutiny (e.g., *Korn* v. *Franchard Corp.*, 388 F.Supp. 1326, 1330 (S.D.N.Y. 1975)); the case is also readily distinguishable. The settlement agreement in *Perlstein* was found by this Court to be illegal, as a renewed violation of Regulation T, violations of which were the basis of plaintiff's claim. Moreover, the circumstances under which the settlement agreement was extracted from plaintiff there constituted a take it or leave it proposition presented the same day plaintiff's sizeable (and illegal) obligation to defendants fell due. In contrast, here the Settlement Agreement was the product of lengthy negotiations and, the evidence shows, eagerly sought by plaintiffs

[18] As noted (p. 11, *supra*) Halliwell and Mogul claimed to have an opinion of counsel that the 1959 contract was unenforceable.

for the obvious affirmative benefits to them. As stated more fully at pages 25-28 *infra*, plaintiffs' conduct following execution of the Settlement Agreement is enough to distinguish *Perlstein*.

Austin Instrument, Inc. v. *Loral Corp., supra* (pl. br. 56), discussed more fully at pp. 27-28 *infra*, is similarly distinguished by the circumstances under which the Settlement Agreement here was negotiated, or by the unquestioned good faith claims asserted by Continental.

Under this Court's decisions, Judge Bonsal was correct in concluding that plaintiffs' trial evidence (and proffered evidence) was legally insufficient to establish duress.

(2) Plaintiffs may not impeach the Settlement Agreement by arguing the merits of the claims settled.

Plaintiffs have devoted much of their efforts in this Court, as in the District Court, to a conjectural (51a) and distorted description of early dealings among the parties, and to legal arguments over the validity of the 1964 agreements, the 1967 agreements, and the 1967 releases when originally executed. All of this, and plaintiffs' related derogatory language about fiduciaries releasing themselves from liability, are quite beside the point on the issue of settlement in this Court as well as at the trial. It is fundamental jurisprudence, and essential to the purposes served by compromise and settlement, that

> A contract of settlement, if valid in itself, is final and is to be sustained by the court without regard to the validity of the original claim. (*Yonkers Fur Dressing Co.* v. *Royal Insurance Co.*, 247 N.Y. 435, 444, 160 N.E. 778 (1928))

Accord, *Smith* v. *Glen's Falls Insurance Co.*, 62 N.Y. 85 (1875); *Sears* v. *Grand Lodge of the Ancient Order of*

United Workmen, 163 N.Y. 374, 379, 57 N.E. 618 (1900) and cases cited; *Wallace* v. *McCabe,* 41 Misc. 2d 483, 484-485, 245 N.Y.S. 2d 854, 855 (Nassau Sup. 1964) ("the Court should not look behind the compromise to determine the validity of such [prior] claims"). This is so even if the original claim of a party is subsequently determined to have been ill founded or even illegal, *Radinsky* v. *City of New York,* 133 N.Y.S. 2d 540, 542 (Kings Sup. 1954) (original claim "without legal validity and incapable of enforcement").

Plaintiffs' diatribes against the validity of the 1964 and 1967 contracts and the 1967 releases as void *ab initio,* or their contention that the 1959 contract as amended had become impossible of performance, has nothing to do with the validity of the Settlement Agreement. Issues such as these are what make settlement agreements, not what will invalidate them.

Plaintiffs only add confusion by discussing whether the 1967 releases were capable of ratification. Although defendants pleaded the releases as a separate affirmative defense (22a-23a; 28a), their validity when executed or susceptibility of ratification is irrelevant to the scope and effect of the Settlement Agreement.[19] Reaffirmation of the releases, like the other provisions of the Settlement Agreement, evinces the parties' desire to settle all outstanding

[19] Lest it be suggested that defendants are conceding that the 1967 agreements and releases are invalid, the law of New York (which Judge Bonsal held applicable, a conclusion not challenged by plaintiffs) is clear that a contract between companies with joint directors is voidable only, and not absolutely void, Business Corporation Law § 713. As voidable contracts, the releases are susceptible of later ratification, *Powell* v. *Oman Construction Co.,* 25 A.D. 2d 566, 267 N.Y.S. 2d 862 (2d Dept. 1966). Ratification of the releases in the Settlement Agreement by plaintiffs' independent boards of directors, and Halliwell's shareholders, would serve as an additional bar to the claims asserted in the amended complaint.

disputes, whether or not those releases would eventually have been found to be voidable or void.

Following execution of a valid settlement agreement, the prior claims of the parties are extinguished and replaced with the obligations of the settlement, *Yonkers Fur Dressing Co.* v. *Royal Insurance Co., supra,* 247 N.Y. at 446; *Hegeman* v. *Conrad,* 1 A.D. 2d 788; 148 N.Y.S. 2d 196 (2d Dept. 1956). Judge Moore, speaking for this Court in *Protective Closures Co., Inc.* v. *Clover Industries, Inc.,* 394 F.2d 809, 812 (1968), neatly stated the proposition thus:

> Compromise and settlement agreements are sometimes referred to as "superceding agreements." See *Langlois* v. *Langlois,* 5 A.D. 2d 75, 78; 169 N.Y.S. 2d 170, 173 ([3d Dept.] 1957). By this is meant that the valid compromise agreement is substituted for the antecedent claim or right, the rights and liabilities of the parties are now measured by the terms of the agreement. 15 Am. Jur. 2d, Compromise and Settlement § 21.

Though not designated a release, a valid settlement agreement will act as one, *Morehouse* v. *Second National Bank of Oswego,* 98 N.Y. 503, 509-10 (1885); *Kelly* v. *Greer,* 365 F.2d 669 (3d Cir. 1966); 15 Am. Jur. 2d, Compromise and Settlement § 20.

As found by Judge Bonsal, dealings among the parties prior to a settlement are relevant only as evidence (where the agreement is unclear) of the matters intended to be settled, and to show that parties were aware of the matters being settled—two items not challenged in this Court. The District Court did not, and this Court should not, permit a collateral attack on the Settlement Agreement.

(3) Plaintiffs waived any claim of duress they may have had.

The District Court specifically found that, even if plaintiffs had proved duress, their conduct following execution of the Settlement Agreement was such as to waive their claim (53a, 55a). It has long been the law in New York that a contract procured under duress is merely voidable, and not absolutely void, and "one who would repudiate a contract procured by duress must act promptly or will be deemed to have elected to affirm it", *Scientific Holding Co., Ltd.* v. *Plessey Inc., supra*, 510 F. 2d at 23.

The Court of Appeals of the State of New York long ago stated this principle in language particularly apt to this case:

> The facts constituting the duress were immediately known to the plaintiff and it was its duty to act promptly in repudiating the agreement which it had been induced to enter into by duress. Instead of so doing it never repudiated the agreement until it commenced its action, more than six years after the agreement of August thirteenth had been entered into . . .; and during all that time down to the commencement of this action, it paid the semi-annual interest coupons upon the bonds. *Oregon Pacific R.R. Co.* v. *Forrest*, 128 N.Y. 83, 92, 28 N.E. 137 (1891).

Halliwell's conduct following execution of the Settlement Agreement refutes even the suggestion of duress. The agreement was signed on March 15, 1968. Halliwell immediately took steps to secure the appropriate shareholder approval. That approval was obtained in mid-May 1968 with Halliwell's president voting his proxies in favor of the Agreement at the shareholders meeting. Immediately following shareholder approval Halliwell requested Continen-

tal to perform under the Agreement.[20] Halliwell continued to perform under the Agreement until it filed its complaint more than two years after execution of the agreement, and continued performance for another year after that. Under these circumstances, the plaintiffs' claim is barred as a matter of law. See *Scientific Holding Co., Ltd.* v. *Plessey Inc., supra* (four month delay); *Leader* v. *Dinkler Management Corp.* 26 A.D. 2d 683, 272 N.Y.S. 2d 397 (2d Dept. 1966), *aff'd*, 20 N.Y. 2d 393, 283 N.Y.S. 2d 281, 230 N.E. 2d 120 (1967) (six month delay); *Joseph F. Egan, Inc.* v. *City of New York, supra* (two year delay); *Port Chester Electrical Construction Corp.* v. *Hastings Terraces, Inc.* 284 A.D. 966, 966-967; 134 N.Y.S. 2d 656, 658 (2d Dept. 1954) (fifteen month delay).

In this context, it should be noted that prompt disavowal was entirely possible under the terms of the Agreement. Continental provided, and Halliwell and Sedren received, immediately, all the benefits of the Settlement Agreement—deferred payments on past due obligations and $300,000 in new money, among other things—and the Settlement Agreement terminated all prior relationships between plaintiffs and Continental.

Commencement of this lawsuit in April 1970 did not constitute a disaffirmance of the Settlement Agreement even though the complaint sought recovery of matters settled in 1968. Far from disaffirming the Agreement in its original complaint, plaintiffs continued to perform under the Settlement Agreement, making payments provided by that Agreement until July 1971.

Moreover, plaintiff accepted all the benefits to it under the Settlement Agreement, another undisputed fact which

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[20] Each of these actions is evidence of a lack of duress. *Allstate Medical Laboratories, Inc.* v. *Bleivas, supra.*

conclusively bars recovery, *Jenad, Inc.* v. *Village of Scarsdale,* 38 Misc. 2d 658, 661, 238 N.Y.S. 2d 156, 159 (Westchester Sup. 1963), *rev'd on other grounds* 23 A.D. 2d 784, 258 N.Y.S. 2d 777 (2d Dept. 1965), *rev'd on other grounds* 18 N.Y. 2d 78, 271 N.Y.S. 2d 955, 218 N.E. 2d 673 (1966); Restatement, Contracts (1932) § 483 and comment b, § 484. Plaintiffs have never tendered or offered to tender to Continental the benefits obtained by them under the Settlement Agreement.

Plaintiffs' excuse for failure promptly to repudiate the contract is lame indeed, and illustrates the rationale for requiring prompt disaffirmance of a contract allegedly procured by duress. It is claimed (pl. br. 43) that plaintiffs continually faced the threat of a foreclosure action by Continental should Sedren repudiate the contract and bring an action against Continental. First, plaintiffs have offered no evidence that such a threat was ever made; the mortgage had been in default since June 1967 with no attempt to foreclose (dx AG, 552A). Nor is there any evidence or explanation why Sedren could not continue the mortgage payments and repudiate the remaining terms of the contract; in fact, cash payments to Continental for discounts continued through July 1970.

Secondly, as noted, a threat to invoke lawful process to enforce a valid claim (and plaintiffs have never alleged any infirmity in the mortgage obligation as originally made or as modified in 1968) is not duress as a matter of law. Plaintiffs' argument, even if supported by the evidence, would explain only a desire by plaintiffs to retain the benefits of the Settlement Agreement and at the same time resurrect the claims settled, effectively frustrating the basic purpose of a settlement.

Plaintiffs mistakenly cite *Austin Instrument, Inc.* v. *Loral Corp., supra,* as analogous to this case. But in *Austin*

the duress practiced was blatant brinksmanship, as contrasted to the leisurely negotiations here and the unquestioned good faith of the claims asserted by Continental. Moreover, the threat of similar activity by the defendant for some time following the initial contract was obvious in *Austin;* there is no evidence here that any threat was ever made, and even if made the possibility of a foreclosure action cannot become continuing duress for the reasons stated above.

Whether a failure promptly to disavow a contract entered into under duress is termed a ratification or affirmance of the contract (*Maisel* v. *Sigman,* 123 Misc. 714, 723, 205 N.Y.S. 807, 814 (New York Sup. 1924)); or a waiver of the claim of duress (*Joseph F. Egan, Inc.* v. *City of New York, supra*) or an estoppel (*Jenad, Inc.* v. *Village of Scarsdale, supra*), the effect is the same—the allegation of duress is insufficient as a matter of law. *Scientific Holding Co., Ltd.* v. *Plessey Inc., supra.*

(4) It was not error for the District Court to exclude the proffered testimony of Adolph H. Graetz.

Plaintiffs offered Adolph H. Graetz as a trial witness on the issue of settlement in this case, and plaintiffs now claim that Judge Bonsal's refusal to permit him to testify is itself reversible error (pl. br. 45).

Graetz was an officer and director of Halliwell from 1961 "past 1968" (pl. br. 8). As a Halliwell and Sedren director, Graetz voted in favor of the Settlement Agreement (dx K, L; 294A-302A); as a Halliwell director, Graetz voted in favor of the 1964 and 1967 agreements between Halliwell, Sedren, and Continental (44a; px 30, 233A-235A). A Halliwell stockholder, Graetz attended the meeting of Halliwell shareholders in May 1968 at which the Settlement Agreement was unanimously approved (dx N;

320A, 327A). Graetz testified in eight sessions of oral deposition in this case, and submitted an affidavit in support of Halliwell's motion for summary judgment; in their brief in this Court, plaintiffs frequently quote from or cite to the deposition testimony and affidavit.[21]

Plaintiffs offered Graetz at trial to testify

> . . . as to the reason why the board of directors signed the March 1968 agreement, the financial condition the corporation was in at the time which made it impossible to resist the demands of Continental (tr. 44)
>
> . . . [that the plaintiffs] were compelled to choose the lesser of two evils (tr. 49)

or that

> . . . when an additional agreement was submitted to the directors of Halliwell they had no choice, they had to submit, and what is now claimed to be a settlement agreement was an agreement that was exacted and extorted from the board of directors of Halliwell (tr. 50).

In their brief in this Court, plaintiffs' counsel expressed the offer of proof in somewhat broader terms; it is claimed that Graetz

> . . . was prepared to testify from his own personal knowledge, in the greatest detail, to the circumstances

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[21] Plaintiffs did not offer Graetz's affidavit to the trial court either as an offer of proof or as independent evidence, despite Judge Bonsal's receptiveness to receipt of such evidence as indicated by his willingness to receive all deposition testimony designated by the parties (tr. 55-56). As is apparent from the citations in plaintiffs' brief in this Court, plaintiffs designated many portions of the Graetz deposition as trial evidence.

> under which the 1964, 1967 and the March 15, 1968 contracts, as well as the 1967 general releases, were exacted from Halliwell-Sedren by Continental and the Continental nominees upon the Halliwell-Sedren boards (pl. br. 8, citations omitted).[22]

From the foregoing analysis of the judicial authority relating to a claim of duress, it is at once apparent that the proposed testimony of Graetz would have been simply irrelevant to the validity of the Settlement Agreement. The 1964 and 1967 agreements, and the circumstances under which they were executed, as they affect the Settlement Agreement, are contained in facts stipulated by the parties (dx C, 257A-260A). Similarly, since proper board approval by Halliwell and Sedren of the Settlement Agreement is not at issue, proposed testimony about that subject would also have been irrelevant, as would any proposed testimony (not adverted to in plaintiffs' offer of proof at trial or in their brief in this Court) about Halliwell's procurement of shareholder approval of the Agreement.

Moreover, whatever Graetz might have said at trial about the matters alluded to by plaintiffs' counsel in this Court, he could not have denied failure by plaintiffs to repudiate the Settlement Agreement or to tender back to Continental the benefits received, or performance by plaintiffs of the Agreement even after this action was commenced—either of which constitutes sufficient basis for sustaining the validity of the Agreement. Since only relevant testimony is admissible, and since (as appears from plaintiffs' brief in this Court) much of Graetz's proffered testimony would only have added irrelevant surplusage to the record, the District Court was correct in refusing to receive

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[22] Plaintiffs also refer to proposed testimony by Graetz at pages 32n, 36n, 40, and 45 of their brief in this Court. The substance of each of these belated offers is contained in the general statement quoted above.

it, Fed. Rules Ev. 402; *Jones* v. *United States*, 387 F.2d 1004, 1009 (10th Cir. 1967).

Plaintiffs must also demonstrate—and have not demonstrated either in their offer of proof at trial or in their brief in this Court—that Graetz's testimony would have added new material to the record and would not merely have been cumulative, *Elliott* v. *Maggiolo Corp.* 525 F.2d 439, 444 (2d Cir. Sept. 12, 1975), *United States* v. *Barash*, 365 F.2d 395, 401 (2d Cir. 1966). The "circumstances" under which the Settlement Agreement were presented and executed, and "the financial and economic condition of the corporation" at that time (tr. 42) are of course relevant to the issue of duress; however, plaintiffs' trial witness, Robert Bell, testified in some detail as to these matters [23] (tr. 66-78, 123-128); and as Judge Bonsal noted and plaintiffs' counsel acknowledged (tr. 45), the financial condition of Halliwell and Sedren was readily available for consideration from the company's financial statements and the text of annual reports.[24] Perhaps Graetz could have added unnecessary detail to these data on the record [25], but nothing was offered

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[23] Bell, a Canadian chartered accountant (tr. 61-62), was an officer and director of Halliwell from before 1959 through April 1967 (tr. 64, 81-82; see pp. 7-13 *supra*). After his departure from the Halliwell board, Bell continued to follow Halliwell's affairs and financial condition closely, discussing the latter daily with Cooper, Halliwell's "head officer" (tr. 68). Bell's employer, Mogul, was Halliwell's primary debentureholder in 1968, and was a party to the negotiations preceding the Settlement Agreement (pp. 7-13 *supra*). The Settlement Agreement was a matter of much concern to Bell and the other members of the Mogul board when consideration of the simultaneously executed debentureholder agreement was approved (tr. 73-77).

[24] The District Court in fact referred to both in its opinion (45a-46a).

[25] The adjectives used by plaintiffs' counsel (e.g. pl. br. 40, 45) in this Court suggest that Graetz's testimony might have also added unnecessary histrionics.

which would have added to the substance of Bell's testimony. The offer of proof, even if considered as favorably as possible to plaintiffs, could not supply the many essential elements of duress missing from plaintiffs' case.

Graetz was *not* offered to prove bad faith on Continental's part in pressing for resolution of Halliwell's and Sedren's indebtedness to it, or to impeach the Settlement Agreement other than by reason of duress. Such an offer cannot be implied from the general offer of proof made at trial or even from the more sweeping statements in plaintiffs' brief here. An offer of proof under Rule 103(a)(2) of the Federal Rules of Evidence (the successor to Fed.R.Civ.P.43(c)) must be specific, *Elliott* v. *Maggiolo Corp., supra,* 525 F.2d at 444; *Moss* v. *Hornig,* 314 F.2d 89, 93 (2d Cir. 1963), and any lack of specificity at trial may not be supplied by statements of counsel on appeal, *Fortunato* v. *Ford Motor Co.,* 464 F.2d 962, 969 (2d Cir. 1972). Any such defect here can certainly not be cured by plaintiffs' equally general quotation out of context from *First National Bank of Cincinnati* v. *Pepper,* 454 F.2d 626, 632 (2d Cir. 1972) (pl. br. 8-9). The reference to "all the facts" in the *Pepper* case is only to the facts germane to the plaintiffs' claim of duress in that case, circumstances which were developed in the record here, albeit in more factual and less vitriolic terms than in plaintiffs' brief.

The District Court's exclusion of Graetz's proposed testimony was not erroneous, and in any case not prejudicial to plaintiffs.

II.

Plaintiffs May Not Avoid The Settlement Agreement By Their Own Failure To Perform Their Contractual Obligations.

The Settlement Agreement was subject to approval by the shareholders of Halliwell (dx A, ¶ 6a, 247A); the Settlement Agreement also provided (*id.* ¶ 8, 248A) that

> Forthwith upon the execution hereof, Halliwell shall convene a general meeting of its shareholders for the purpose of effectuating this agreement.

As noted, the Halliwell board authorized a shareholders meeting, and approved an Information Circular and Proxy Statement to be sent to the shareholders prior to the meeting (dx L, M, 296A-317A). At the annual meeting Halliwell obtained unanimous shareholder approval of the Settlement Agreement and the debentureholder agreement.

Now it is contended that the proxy material prepared by Halliwell for its shareholders was deficient for failing to "alert the shareholders of Halliwell's right to recover from Continental for its depredations from June of 1964 to the date of the meeting" (pl. br. 43, 57), and that because of this omission Halliwell may avoid the Settlement Agreement. The short and complete riposte to this remarkable charge may be found in Judge Bonsal's opinion (54a):

> If Halliwell failed to properly comply with Canadian law with respect to the stockholders' meeting or failed to properly inform the stockholders of Continental's prior alleged economic control at a time when admittedly Continental did not exercise such control, this would become a matter between the stockholders of Halliwell and its directors and management. It does not change the equities as between Halliwell and Continental.

In arguing for the anomalous proposition that their own failure adequately to perform a duty which the contract imposed upon them gives them a right to repudiate the Settlement Agreement, plaintiffs note that the shareholders were not advised of whatever legal rights the corporation may have had against Continental. Significantly, plaintiffs do not, and cannot, claim that Halliwell's board in 1968 was unaware of any material *fact* upon which the alleged claims were based, or that the disclosure to the shareholders misstated the effects of approval of the proposed agreements.

If legal advice in respect to remedies then available against Continental or proper disclosure in the proxy material were appropriate, Halliwell's board—which in March 1968 had been independent of Continental for eight months—was capable of obtaining that advice. Halliwell had previously obtained legal advice from the company's general counsel, Fell, prior to entering into the 1967 contracts, to the effect the 1959 contract was valid and enforceable (pp. 8-9, *supra*); Halliwell was furnished with a later opinion from "United States counsel" that the 1959 contract had become invalid (p. 11, *supra*). Wainberg, a Halliwell director since mid-1967 and Fell's successor as Halliwell's counsel, negotiated and drafted the Settlement Agreement; as a Canadian lawyer, Wainberg was certainly capable of considering the legal consequences of the Settlement Agreement, of obtaining additional advice if necessary, and of advising on the company's disclosure obligations under Quebec law applicable to proxy solicitation. Plaintiffs' argument, if correct, might provide a basis for a claim by the shareholders against their 1968 directors, but, as the District Court found, cannot invalidate the Settlement Agreement as between Halliwell and Continental.

Plaintiffs' citations to cases which hold that a fiduciary seeking release from his *cestui* must inform the *cestui* of

his legal rights are based on the assumption, as expressed in *Adair* v. *Brimmer*, 74 N.Y. 539, 554 (1878) that "confirmation and ratification implied to legal minds, knowledge of a defect in the act to be confirmed, and of the right to reject or ratify it." This assumption, perhaps appropriate for executor-beneficiary relationships, is inapplicable to business dealings where ratification, though not required, is a desirable means of eliminating uncertainty and is often specifically authorized by statute (e.g., New York Business Corporation Law, § 713). Had Continental controlled the Halliwell board at the time shareholder approval of the Settlement Agreement had been sought, perhaps disclosure of the sort plaintiff suggests would have been required of Continental; under plaintiffs' own allegations, however, that was not the fact, and the cases cited by plaintiffs, even if applied to the case at bar, would merely place the duty to inform on Halliwell's directors in March 1968.

III.

The Settlement Agreement Bars Plaintiffs' Claims Against The Individual Defendants As Well As Against Continental.

As with their other assertions, plaintiffs' final contention, that the individual defendants cannot avail themselves of the Settlement Agreement, is answered by the record in this case.

To be sure, none of the individual defendants was a party to the Settlement Agreement. However, there has never been any contention in this lawsuit that the individual defendants were sued as anything other than agents of Continental, as Judge Bonsal found (48a-50a) and as plaintiffs' brief in this Court makes plain. Plaintiffs refer to

the individual defendants as "servants of Continental" who "utilized their positions upon the Halliwell Board solely and only for the purpose of serving and enhancing interests of Continental" (pl. br. 61; see also amended complaint, ¶¶ TWENTY-FOURTH, THIRTIETH, THIRTY-THIRD, 13a-15a).

A brief examination of the nature of the specific claims in the amended complaint is convincing evidence that the interests of the individuals are identical to the interests of Continental, which as a corporation can only act through its agents. None of the individual defendants is alleged to have profited personally; all profits claimed are alleged to have accrued to Continental. The nature of the causes of action asserted against the individuals—mismanagement of the Sedren mine and breaches of fiduciary duty in respect to improvident contracts claimed to have benefited Continental—were matters which were the subject of the accusations against Continental and the individual defendants in 1966 and 1967 and which are obviously contemplated by the parties prior to the execution of the Settlement Agreement.

Plaintiffs do not challenge Judge Bonsal's analysis (48a-50a) that the established rule that a settlement of claims against a principal bars a subsequent suit against an agent is applicable here. As stated in *Gavin* v. *Malherbe*, 146 Misc. 51, 261 N.Y.S. 373, 375, 376 (Kings Sup. 1932), *aff'd* 240 A.D. 779, 266 N.Y.S. 897 (2d Dept. 1933), *aff'd* 264 N.Y. 403, 191 N.E. 486 (1934):

> Although not joint tortfeasors under the doctrine of the foregoing authorities in the sense that the master was an active participant in the negligent or wrongful act, it is likewise true that the doctrine of respondeat superior puts the master and servant

> in such close legal relationship as to intimately affect each other in dealings with third parties. The tort committed by the servant is the same tort for which the master is liable under the doctrine of imputed negligence. Damages recovered for such a tort are entire and not severable. The servant is liable to his master for damages which the master has been compelled to pay to third persons because of the negligent or other wrongful act of the servant, where the master is not himself at fault. 26 Cyc. 1545. For the above reasons it has been held that, despite the fact the master and servant are not joint tortfeasors, a release to one discharges the other. If that were not the case, we might have a situation where a party would settle with the master, then sue and recover against the servant, who would then be liable in a suit brought against him by the master, thus forcing him to pay twice for the one wrong. (1934):

Accord, *Gilbert* v. *Finch*, 173 N.Y. 455, 466, 66 N.E. 133 (1903); *Magidson* v. *Bloom*, 170 Misc. 832, 11 N.Y.S. 2d 324 (N.Y. City Ct. 1939); *Casey* v. *Auburn Telephone Co.*, 155 A.D. 66, 69-70, 139 N.Y.S. 579, 581-582 (4th Dept. 1913).

The only case cited by plaintiffs as support for the proposition that the individual defendants are not protected by the Settlement Agreement does not impeach the rationale of *Gavin*, is factually distinguishable from this case, and points up the basic fallacy of plaintiffs' tactics in this Court. *Rosenfeld* v. *Fairchild Engine & Airplane Corp.*, 201 Misc. 616, 112 N.Y.S. 2d 55 (Nassau Sup.), *aff'd* 279 A.D 1086, 112 N.Y.S. 2d 558 (2d Dept. 1952) (cited at pl. br. 61) was a derivative action against two former directors of the defendant corporation. Prior to the action the corporation had given a release to another former director

who was concededly a joint tortfeasor with the two defendants. Both of the defendants voted in favor of the release to the third director. Stated simply, the case was an action of one joint tortfeasor releasing another, and then claiming that the release, given without reservation, applied in favor of all joint tortfeasors—an obvious anomaly in logic as in law. The *Rosenfeld* case does not, however, stand for the proposition that a corporation may never release its former directors.[26]

And—despite plaintiffs' refusal to acknowledge the fact—this case is *not* an instance of Continental or the individual defendants releasing themselves. The Settlement Agreement was unanimously approved by plaintiffs' admittedly *independent* board of directors. The Settlement Agreement was subsequently ratified by unanimous vote of plaintiffs' shareholders, an action which under plaintiffs' by-laws has the effect of approval by every shareholder of the company (p. 15 *supra*).

Metropolitan Dry Cleaning Machinery Co., Inc. v. *Hirsch*, 38 A.D. 2d 558, 328 N.Y.S. 2d 349 (2d Dept. 1971) is closely analogous to the case at bar. Plaintiff sued Hirsch, its former employee, for breach of his fiduciary duty to his employer, by revealing confidential information to Washex Machinery Corp., his new employer; and in a second count based on the same facts, for conspiracy with Washex to terminate plaintiff's business. Plaintiff reached a comprehensive settlement with Washex that included a general release in favor of Washex. Hirsch, not a party to the

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[26] The cases are clear that a corporation may release its directors or former directors in respect to contracts in which they were personally interested, *e.g.*, *Mendelson Brothers Factors, Inc.* v. *Sachs*, 253 A.D. 270, 1 N.Y.S. 2d 838 (1st Dept.), *aff'd* 279 N.Y. 604, 17 N.E. 2d 459 (1938); *Golding* v. *Weissman*, 35 A.D. 2d 941, 316 N.Y.S. 2d 522 (1st Dept. 1970), *appeal dismissed* 29 N.Y. 2d 913, 328 N.Y.S. 2d 863, 279 N.E. 2d 606 (1972).

Washex settlement or the release, defended the claims against him by asserting that the release to Washex released him as well. The Supreme Court sustained the defense in respect to the conspiracy charge, but denied a motion to dismiss the breach of fiduciary duty claim. The Appellate Division reversed, holding that settlement and the releases were a complete defense:

> . . . if the alleged wrongful acts result in the same injuries, the damages from such acts are not increased and the law will permit but a single recovery. This court will not permit a plaintiff to indulge in "the niceties of legal theory" to avoid the effect of the general release and obtain a second recovery (citations omitted). In view of the nature of the joint liability of Washex and defendant [Hirsch], the release of Washex by plaintiff . . . operates as a matter of law to release defendant. (38 A.D. 2d at 560, 328 N.Y.S. 2d at 352)

The *Hirsch* case disposes of any argument based on differentiation of the causes of action against Continental and the individual defendants, and points to very practical reasons for its holding. To permit plaintiffs here to maintain an action against the individual defendants would countenance what the *Hirsch* court rejected: a double recovery by plaintiffs on the same claims—once in the Settlement Agreement and once in this action—and a double payment by Continental, which under a standard by-law provision is obligated to indemnify its directors and officers for any recovery by plaintiff against them. Failure to hold that settlement with Continental runs in favor of its agents would effectively nullify that settlement.

CONCLUSION

The judgment of the trial court was fully supported by the evidence. For the reasons stated herein, that judgment should be affirmed.

Respectfully submitted,

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